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No. 90-119

Supreme Court, U.S.

FILED

SEP 12 1990

JOSEPH F. SPANOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CITIZENS FOR FAIR UTILITY REGULATION, PETITIONER

v.

NUCLEAR REGULATORY COMMISSION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Nuclear Regulatory Commission abused its discretion in denying petitioner's untimely motion to intervene in an administrative proceeding.



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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A9) is reported at 898 F.2d 51. The decision of the Nuclear Regulatory Commission (Pet. App. B1-B11) is reported at 28 N.R.C. 605.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1990. The petition for a writ of certiorari was filed on July 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the decision of the Nuclear Regulatory Commission denying its petition to intervene

in an already concluded administrative proceeding on the ground that the petition was untimely and did not satisfy the requirements established by the Commission's rules of practice for the admission of untimely petitions.

1. Under the Atomic Energy Act of 1954 (Act), 42 U.S.C. 2011 *et seq.*, the NRC is authorized to license and regulate the construction and operation of nuclear power plants. Section 189(a) of the Act, 42 U.S.C. 2239(a), requires the Commission to provide an opportunity for a hearing on certain proposed actions, including the granting of a license to operate such a power plant.

In order to facilitate the orderly conduct of agency business, the Commission has developed rules of practice governing the submission of requests for hearings and the conduct of the hearings themselves. 10 C.F.R. Pt. 2. Those rules provide that an interested person may intervene in an agency licensing proceeding as a matter of right within the time limit contained in the *Federal Register* notice announcing the proposed agency action. Petitions to intervene filed after that time are evaluated on the basis of five enumerated criteria: (1) whether there is good cause for the failure to file on time; (2) the availability of other means to protect the petitioner's interests; (3) the extent to which the petitioner's participation may be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. Pet. App. A4; 10 C.F.R. 2.714(a)(1)(i)-(v). Where there is no "good cause" for the untimeliness of the petition for intervention, the Commission requires a "compelling showing" on the remaining four factors before allowing intervention. See, e.g. *Nuclear Fuel Services Inc. (West Valley Reprocessing Plant)*, CLI-754, 1 N.R.C. 273 (1975).

2. On February 28, 1978, Texas Utilities Electric Company (TU Electric) applied for a license to operate the Comanche Peak Steam Electric Station, a two-unit nuclear power plant that it was constructing approximately 55 miles southwest of Ft. Worth, Texas. Petitioner and two other organizations, the Citizens Association for Sound Energy (CASE), and the Association of Communities for Reform Now (ACORN), filed timely requests to intervene. All three organizations participated in the proceeding until ACORN and petitioner voluntarily withdrew in 1981 and 1982, respectively (Pet. 7; Pet. App. A2, B2). The proceeding then continued before the NRC's Atomic Safety and Licensing Board with CASE as the sole intervenor. By 1984, the proceeding had resolved all disputed issues except a contention relating to quality assurance and quality control in the construction of the plant (Pet. App. A2). In 1986, the NRC convened a related proceeding to consider TU Electric's request to seek additional time to complete construction of Unit 1 of the Comanche Peak Steam Electric Station.

3. On June 28, 1988, CASE and TU Electric reached a settlement agreement. Accordingly, CASE, TU Electric, and the NRC staff (a statutory party to all NRC administrative proceedings) submitted a joint motion to dismiss the administrative proceedings as settled (Pet. App. A3). On July 13, 1988, the Licensing Board held a hearing to review the settlement agreement. After receiving comments from the parties and interested members of the public, including petitioner, and reviewing the documents underlying the agreement, the Licensing Board issued an order publishing those documents and dismissing the proceedings. *Ibid.* See *Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, LBP-88-18B, 28 N.R.C. 103 (1988).

4. On August 11, 1988, petitioner filed a request to intervene in the already settled administrative proceedings, claiming that it satisfied the five criteria enumerated in 10 C.F.R. 2.714(a)(1)(i)-(v). In this request and two later filed supplements, petitioner asserted that it withdrew from the proceedings due to financial considerations and on the assumption that CASE would continue to litigate the proceedings (Pet. App. A6, B2-B3); that it had no alternative means to protect its interests; that it could make important contributions to the record; and that its late intervention would not cause any delay in the proceedings (*id.* at B3-B4).

5. On December 21, 1988, the Commission denied petitioner's request for intervention, finding that petitioner had failed to satisfy the required criteria as interpreted in the Commission's prior decisions (Pet. App. B1-B11).¹ The Commission first determined that petitioner had failed to demonstrate "good cause" for the lateness of its intervention request (Pet. App. B5-B6). Accordingly, petitioner was obligated to make a compelling showing that the remaining four factors weighed in support of its petition. The Commission found that petitioner had not made such a showing. Although two of the four factors supported the petition for late intervention, the ones accorded the most weight—the ability to contribute to the record and the likelihood of delay—weighed against intervention (*id.* at B7-B9). The Commission therefore refused to permit petitioner to intervene.

6. Petitioner sought review of that decision in the court of appeals, alleging that the Commission's decision was arbitrary and capricious.² The court of appeals af-

¹ The opinion was subsequently amended in a way not relevant to the issues raised in this petition. See Resp. Br. in Opp. App. A.

² On the eve of oral argument, petitioner applied for a stay to prevent the operation of the Comanche Peak plant pursuant to the NRC license, pending a decision on the merits. After oral argument, the

firmed the Commission's decision. It concluded that the Commission correctly found that petitioner had not demonstrated "good cause" for the lateness of its requested intervention, and that the Commission's balancing of the remaining four factors was not an abuse of discretion. Pet. App. A1-A9.

ARGUMENT

Neither the Commission nor the court of appeals established any new principle of law or Commission procedure. Instead, the Commission applied clear and consistent administrative precedent to an extremely late request for discretionary intervention and denied that request because petitioner did not satisfy the regulatory requirements. The court of appeals applied well-settled legal principles in reviewing the Commission's fact-bound decision and determined that the Commission did not abuse its discretion in reaching that decision. Moreover, the court of appeals' decision is consistent with decisions of other courts of appeals that have considered similar issues. Thus, the case presents no issue worthy of this Court's attention.

1. The court of appeals properly concluded that the Commission's decision to deny the petitioner's request for late intervention was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). See, e.g., *Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. 87, 90, 105-106 (1983). Moreover, the court of appeals correctly applied the established principle that when reviewing an agency's application and interpretation of its own regulation, "the ultimate criterion

court of appeals denied the stay on February 6, 1990. Justice White also denied a stay. Pet. 4; *Citizens for Fair Utility Regulation v. United States Nuclear Regulatory Comm'n*, No. A-681 (Mar. 30, 1990).

is the administrative interpretation, which becomes of controlling weight unless it is clearly erroneous or inconsistent with the regulation.” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). See also *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989). Specifically, the court of appeals found that the Commission followed its long-standing administrative precedent in determining that petitioner had not established “good cause” for its extremely late petition. Pet. App. A5-A7. The court of appeals also found that the Commission did not abuse its discretion in balancing the remaining four factors against allowing late intervention. *Id.* at A7-A9. These rulings on routine questions of administrative law are correct, and in any event do not involve matters warranting further review.

a. Petitioner argues primarily that its petition for late intervention was justified by the settlement between CASE and TU Electric that terminated the NRC hearing on Comanche Peak. Pet. 9-13. But the court of appeals correctly found that “NRC precedent consistently and clearly indicates that a potential intervenor cannot rely on another intervenor to present a certain view or represent certain interests without assuming the risk that the intervenor will not do so.” Pet. App. A6 (citing, *inter alia*, *Easton Utilities Comm’n v. AEC*, 424 F.2d 847 (D.C. Cir. 1970)).

In *Easton*, the District of Columbia Circuit upheld the Commission’s position in a situation virtually identical to the instant one. As the *Easton* court noted (424 F.2d at 851, quoting *Red River Broadcasting Co. v. FCC*, 98 F.2d 282, 286-287 (D.C. Cir.), cert denied, 305 U.S. 625 (1938)):

“[A] person should not be entitled to sit back and wait until all interested persons who do [timely intervene] have been heard, and then complain that he has not

been properly treated. To permit such a person to stand aside and speculate on the outcome * * * and then permit the whole matter to be reopened in his behalf, would create an impossible situation."

The *Easton* court further explained that "[w]e do not find in statute or in case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger." 424 F.2d at 852.

In the instant case, petitioner voluntarily withdrew from the NRC administrative proceedings in 1982 and sat back to see if the outcome would be favorable. When the outcome was not to its liking, petitioner attempted to re-intervene. As the court of appeals noted (Pet. App. A7 (quoting Pet. App. B6)):

[a]t the time of the filing of the petition to intervene, [petitioner] was a legal stranger to the action. As the NRC succinctly stated, "[petitioner] assumed the risk that CASE would not represent its interest to its complete satisfaction when it withdrew from the proceedings in 1982. It cannot now complain when that risk becomes reality."

The *Easton* court was quite correct in concluding (424 F.2d at 851) that, to "permit the whole matter to be reopened * * * would create an impossible situation." For example, even if a license applicant met all the objections of those who actively opposed the license and the administrative proceeding came to an end through settlement, nothing would have been achieved if the proceeding could be reopened at the request of any person who claimed reliance on the satisfied intervenor. Petitioner's position

would, in many situations, effectively render settlement agreements nugatory.

Moreover, the Commission—like any other regulatory body—is entitled to stability in its proceedings. An agency cannot have its proceedings subject to the whims of intervenors who withdrew only to re-enter whenever they do not like the result achieved by those remaining in the proceeding after they leave. In essence, petitioner would deny the agency, the applicant, the courts, and the general public the benefits of finality in administrative proceedings by requiring those parties to endure the kind of administrative “relay race” described by the *Easton* court (424 F.2d at 852).

b. Petitioner argues that the Commission “fail[ed] to examine seriously the nature and timing of the private settlement agreement ending public licensing proceedings” (Pet. 12-13). That is simply incorrect. The Licensing Board held a full-scale hearing on the settlement agreement, at which the Board entered all agreements and related documents on the record, save only those items which would invade the personal privacy of persons who had signed individual settlement agreements. There was thus a thorough investigation of the settlement agreement and the circumstances surrounding it. Moreover, the NRC continues to oversee the safety of activities at Comanche Peak—as it does at every nuclear plant in the United States, regardless of whether there is an administrative hearing in progress.

The Commission again specifically considered the circumstances surrounding the settlement agreement when reviewing and rejecting petitioner’s untimely petition to intervene. See, e.g., Pet. App. B3-B6. The court of appeals also considered and rejected petitioner’s argument that its surprise at the settlement agreement constituted “good

cause” for the untimeliness of its attempt to intervene. *Id.* at A6.

c. The decision of the court appeals is clearly consistent with the decisions of other courts of appeals in similar cases. See, e.g., *Easton Utilities Comm’n v. AEC*, *supra*. Contrary to petitioner’s suggestion (Pet. 11-12), *WFTL Broadcasting Co v. FCC*, 376 F.2d 782 (D.C. Cir. 1967), is inapposite. *WFTL Broadcasting* concerned an agency denial of a request to intervene as a matter of *right*, and the court of appeals remanded the case for the FCC to consider the possibility of intervention as a matter of *discretion*, 376 F.2d at 784-785. Here, petitioner virtually concedes that it has no *right* to intervene (Pet. 6), and the agency has fully and correctly considered whether discretionary intervention should be permitted. The instant petition to intervene came nine years after proceedings began, seven years after petitioner withdrew from the proceedings voluntarily, and one month after the proceedings had been dismissed. This case, in short, involves no significant question of law, but centers solely around a fact-specific application of the NRC’s *discretionary* intervention standards. See 10 C.F.R. 2.714(a)(1)(i)-(v).

2. Finally, petitioner suggests (Pet. 13-15) that a recurring problem with check valves at the Comanche Peak plant constitutes a “fundamental flaw” which, according to petitioner, mandates a reopening of the NRC administrative proceedings.³ Petitioner argues that *Union of Con-*

³ While petitioner argued before the Commission that the check valves were defective, petitioner did not contend that those valves constituted a “fundamental flaw” justifying reopening of the licensing proceedings either in its petition to intervene before the Commission or in its petition to review the Commission’s decision before the court of appeals. Thus, the argument is not properly raised in the petition for certiorari. See, e.g., *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501 (1955); *Unemployment Compensation Comm’n v. Ara-*

cerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985), and *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, ALAB-903, 28 N.R.C. 499, 505 (1988), support this proposition. Petitioner is in error. Both of those cases considered the adequacy of an applicant's emergency evacuation plan, as determined through pre-licensing emergency preparedness exercises, and noted that a "fundamental flaw" disclosed through such exercises would justify reopening the licensing hearing. The cases have no applicability to allegations that individual pieces of equipment are defective.⁴

In this case, petitioner's allegation that a specific piece of equipment has failed to function properly is typical of the kinds of contentions raised by persons seeking to intervene in ongoing proceedings. See 10 C.F.R. 2.714(b). The Commission acted well within its discretion in rejecting a request for late intervention to litigate the adequacy of a particular piece of allegedly defective equipment — a piece

gon, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented.").

⁴ As *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, ALAB-903, 28 N.R.C. 499, 505 (1988) points out, to justify reopening the challenging party must demonstrate "a failure of an essential element of the plan," and must show that the defect "can only be remedied by a significant review of the plan." Indeed, when litigating a "fundamental flaw" in an emergency plan, an intervenor is limited to litigating only those items which are identified as a part of the "fundamental flaw." *Id.* at 504. Even if we assume that these cases are relevant to the quite different question of alleged defects in equipment, petitioner has not demonstrated that a significant review of the plant specifications is necessary, and attempts to litigate issues far beyond the alleged defects in the check valves. In any event, petitioner suggests no reason why the alleged defect could not be remedied by simply replacing the equipment.

of equipment that is no more significant than many of the myriads of other pieces of equipment at the plant.

The refusal to reopen does not, of course, mean that the Commission is ignoring a safety issue. The NRC technical staff has the authority and the responsibility to assure that reactor safety is not impaired by faulty equipment, regardless of whether the matter is being litigated before a Licensing Board. If the improper functioning of reactor equipment poses a safety hazard, the Commission may require TU Electric to repair or replace the equipment. But nothing in the Atomic Energy Act or Commission regulations calls for reopening a closed adjudicatory hearing merely on the basis of a claim of an equipment malfunction.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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